



**United Nations
Conference
on Trade and
Development**

Distr.
GENERAL

TD/B/COM.2/1
15 October 1996

Original: ENGLISH

TRADE AND DEVELOPMENT BOARD
Commission on Investment, Technology
and Related Financial Issues
First session
Geneva, 18 November 1996
Item 2 of the provisional agenda

PROVISIONAL AGENDA AND ANNOTATIONS

I. PROVISIONAL AGENDA

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2. Adoption of the agenda and organization of work
3. Developments in international investment: interaction between investment and trade and its impact on development
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II. ANNOTATIONS TO THE PROVISIONAL AGENDA

Introduction

1. As mandated by UNCTAD IX, the Commission on Investment, Technology and Related Financial Issues will deal with the areas identified in paragraphs 89 (a)-(g); 91 (iii); 89 (k)-(m); and 87 (i) of "A Partnership for Growth and Development" (TD/377). The Commission will perform integrated policy work in its areas of competence. It has specific mandates and greater delegation of decision-making on matters of substance. It meets once a year unless otherwise decided by the Board.

Item 1 - Election of officers

2. In accordance with rule 18 of the rules of procedure of the main Committees of the Trade and Development Board, the Commission shall elect a Chairman, five Vice-Chairmen and a Rapporteur from among the representatives of its members, taking into account the need to ensure an equitable geographical distribution. Moreover, rule 19 of the same rules of procedure states that the Bureau of the Commission shall consist of seven members, including four members from Groups A and C combined, two members from Group B and one member from Group D, referred to in the annex to General Assembly resolution 1995 (XIX) as amended.

3. The Commission may therefore wish to elect its Bureau in accordance with the above rules.

Item 2 - Adoption of the agenda and organization of work

4. The provisional agenda for the first session of the Commission, as reproduced in section I above, was approved by the Trade and Development Board at its thirteenth executive session on 8 July 1996.

Documentation

TD/B/COM.2/1

Provisional agenda and annotations

5. Concerning the organization of the work of the session, the Commission has five days available. It is suggested that the agenda items be taken up sequentially, with the first plenary meeting, on Monday 18 November, being devoted to procedural matters, introductory statements and the commencement of the discussion under item 3. The discussion is expected to continue until the close of the afternoon meeting on Tuesday 19 November. Item 4 would be taken up on Wednesday 20 November, and items 5, 6 and 7 in the morning session of Thursday 21 November. The last plenary meeting, on Friday 22 November, would be devoted to the adoption of any formal action and to item 8.

6. The secretariat will prepare a tentative sequence of issues to be dealt with by the Commission which will be available on the first day of the session.

Item 3 - Developments in international investment: interaction between investment and trade and its impact on development

7. Against the background of global and regional FDI trends and on the basis of an analysis of the interrelationships between FDI and trade, the Commission will discuss national and international policy measures designed to increase the contribution of FDI to development, including especially measures to encourage FDI flows to developing countries, especially LDCs. To facilitate the discussion, the report on this item summarizes the information in the World Investment Report 1996.¹

Documentation

UNCTAD/DTCI/32 (Overview)

"Overview of the World Investment Report 1996:
Investment, Trade and International Policy
Arrangements

8. The World Investment Report 1996 will serve as a background document for the deliberations. A background paper on "Experiences gained in technical cooperation with respect to best practices in investment promotion" (TD/B/COM.2/Misc.1, (English only)) reports the findings of the survey conducted by the secretariat on "Best practices in investment promotion". The report also indicates how the technical cooperation programme of the Division on Investment, Enterprise Development and Technology supports developing countries' efforts to succeed in promoting investment.

Item 4 - Issues related to competition law of particular relevance to development

9. The Commission will focus on examining issues related to the subject: continuing analytical work on restrictive business practices and assistance in formulating competition policies and legislation. To facilitate the discussion, experts will prepare a report.²

1 This annotation was approved by the Trade and Development Board at its thirteenth executive session (see TD/B/EX(13)/2, annex III. B, item 3).

2 Idem, item 4.

10. In line with the above, the Board decided to hold the Expert Meeting on Competition Law and Policy on 13-15 November, just before the first session of the Commission, in order for the Chairman of the Expert Meeting to present the report of that Meeting, highlighting the main points under this item of the session. The report of the Third United Nations Conference to Review all Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (TD/RBP/CONF.4/15) will be available.

Documentation

TD/B/COM.2/2 and Add.1 Issues related to competition law of particular relevance to development

Item 5 - Reports requiring the attention of the Commission

11. Under this item, consideration would be given to the report of the UNCTAD secretariat on the activities of the programme and to the report of the Intergovernmental Group of Experts on International Standards of Accounting and Reporting.³

Documentation

TD/B/COM.2/Misc.2
(English only)

Report by the UNCTAD secretariat on the activities of the programme

TD/B/ITNC/7

Report of the Intergovernmental Working Group of Experts on International Standards of Accounting and Reporting on its fourteenth session

Item 6 - Provisional agenda for the second session of the Commission and any necessary preparation through expert meetings

12. In accordance with rule 8 of the rules of procedure of the main Committees, the secretariat will submit during the session a draft provisional agenda for the second session of the Commission on Investment, Technology and Related Financial Issues tentatively scheduled to be convened from 29 September to 3 October 1997.

Item 7 - Other business

13. In accordance with the decision taken at UNCTAD IX (para. 114 of "A Partnership for Growth and Development" (TD/377)), the Commission may convene expert meetings of short duration, not exceeding three days, in order to benefit from a higher level of technical expertise. Expert meetings should receive from the parent Commission precise terms of reference. In the light of the provisional agenda for the second session, the Commission may decide on the expert meetings to be convened during 1997.

Item 8 - Adoption of the report of the Commission

14. The report of the Commission will be submitted to the Trade and Development Board for consideration.



**United Nations
Conference
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Development**

Distr.
GENERAL

TD/B/COM.2/2
12 September 1996
Original : ENGLISH

TRADE AND DEVELOPMENT BOARD
Commission on Investment, Technology
And Related Financial Issues
First session
Geneva, 18 November 1996
Item 4 of the provisional agenda

ISSUES RELATED TO COMPETITION LAW OF PARTICULAR
RELEVANCE TO DEVELOPMENT

Note by the UNCTAD secretariat

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I. INTRODUCTION

1. The "Partnership for Growth and Development" adopted by UNCTAD IX, in analysing the "challenges arising from globalization and liberalization among countries facing different circumstances", recognized that: "Competition policy is one important new policy area. There is growing realization that anti-competitive practices can have a negative influence on trade opportunities arising from trade concessions and obligations. The challenge faced by developed and developing countries alike is to introduce effective national policies in this respect. At the same time this issue may be considered at the international level. The TRIMs Agreement has formally recognized that competition policy and investment policy are closely related and thus require parallel consideration. Relevant to this consideration is the work carried out in UNCTAD on restrictive business practices (RBPs). The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of RBPs is the only multilateral instrument on the importance of competition principles" (TD/377, para. 29).

2. Moreover, in part II of the same text on "The contribution of UNCTAD to sustainable development", UNCTAD IX decided that UNCTAD's work on "international trade in goods and services, and commodity issues", to be undertaken in cooperation with WTO and other relevant international organizations, will focus, *inter alia*, on:

"Examining issues related to competition law of particular relevance to development; continuing analytical work on restrictive business practices; assisting [developing countries, particularly least developed countries and certain developing countries with structurally weak and vulnerable economies, and economies in transition] to formulate competition policies and legislation; institution-building; focusing on Africa by holding a regional meeting, creating relevant inventories and data bases, and establishing a technical cooperation programme;" (TD/377, para. 91 (iii)).

3. In addition, with respect to technical cooperation, UNCTAD IX decided that work on international trade in goods and services, and commodity issues, should focus, *inter alia* on: "Supporting strategies in promoting national competition and consumer protection law and policy formulation" (TD/377, para. 97 (ii)).

4. Finally, with respect to UNCTAD's intergovernmental machinery, UNCTAD IX decided that the Commission on Investment, Technology and Related Financial Issues will, *inter alia*, deal with the area defined in paragraph 91 (iii), i.e. competition.

5. In turn, the Trade and Development Board, at its thirteenth executive session, in adopting the draft provisional agenda for the first session of the Commission submitted by the President of the Board,¹ decided that agenda item 4 of the Commission on Investment, Technology and

¹ Follow-up to the recommendations adopted by the Conference at its ninth session (TD/B/EX(13)/L.2).

Related Financial Issues would read: "Issues related to competition law of particular relevance to development"; and that under that agenda item, "the Commission will focus on examining issues related to the subject: continuing analytical work on restrictive business practices and assistance in formulating competition policies and legislation. To facilitate the discussion, experts will prepare a report."

6. The Expert Meeting on Competition Law and Policy, meeting on 13-15 November 1996 (the week just before the first meeting of the Commission (18-22 November 1996)), will submit its report to the Commission.

II. BACKGROUND RELATING TO UNCTAD's WORK ON RESTRICTIVE BUSINESS PRACTICES

7. It should be recalled that UNCTAD has been active in the field of competition and restrictive business practices since the early 1970s. Work in this area culminated in the adoption, by the General Assembly in its resolution 35/63 of 5 December 1980, of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. To date, as recalled by UNCTAD IX in the Midrand Declaration, the Set is the only multilateral instrument on competition in existence. However, it is in the form of a recommendation to States, and hence, is non-binding in nature.

8. In implementation of the Set, and in particular of its section G devoted to international institutional machinery, an "Intergovernmental Group of Experts on Restrictive Business Practices operating within the framework of a Committee of UNCTAD" was established in 1981 and has held 14 sessions since. Moreover, the Set provided for a review procedure, whereby "subject to the approval of the General Assembly, five years after the adoption of the Set of Principles and Rules, a United Nations Conference shall be convened by the Secretary-General of the United Nations under the auspices of UNCTAD for the purpose of reviewing all the aspects of the Set of Principles and Rules" (section G, para. 6, of the Set). Pursuant to this review procedure contained in the Set, a first Review Conference took place in 1985, which was followed, subsequently, by the Second Review Conference in 1990 and the Third Review Conference on 13-21 November 1995. At its closing meeting, on 21 November 1995, the Third Review Conference adopted a resolution, which is contained in annex I to its report.²

9. In its resolution, the Third Review Conference established a detailed programme of work in the field of competition law and policy, in particular with respect to technical cooperation and assistance for developing countries and countries in transition, studies and consultations to clarify common ground in this area. Moreover, the Review Conference affirmed the fundamental role of competition law and policy for sound economic development and recommended the continuation of the important and useful work programme within UNCTAD's intergovernmental

² Report of the Third United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (TD/RBP/CONF.4/15).

machinery that addresses competition law and policy issues and proceeds with the active support and participation of competition law and policy authorities of member countries. It also recommended to the United Nations General Assembly to change the title of the IGE on Restrictive Business Practices to that of Intergovernmental Group of Experts on Competition Law and Policy; and further recommended that the General Assembly convene a Fourth United Nations Conference on the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, to be held in Geneva, under UNCTAD auspices, in the year 2000.

10. Pursuant to this resolution, and taking into account the Midrand Declaration, a draft resolution has been under consideration by the General Assembly. At the time of writing, no decision has been taken by the General Assembly in this respect.

III. CONTINUING ANALYTICAL WORK ON RESTRICTIVE BUSINESS PRACTICES AND ASSISTANCE IN FORMULATING COMPETITION POLICIES AND LEGISLATION: CONCLUSIONS AND SUGGESTIONS FOR ACTION

11. As can be seen from the above, ongoing work in the area of competition law and policy involves analytical work on restrictive business practices and assisting countries in formulating competition policies and legislation, as well as other technical cooperation activities.

12. Work currently under way by the secretariat at the request of the Review Conference includes revisions of a number of analytical documents in the light of comments by member States. These are (i) a study on "The role of competition policy in economic reforms in developing and other countries" (TD/RBP/CONF.4/2); (ii) a note on "Selected cases of restrictive business practices that have an effect in more than one country, in particular developing and other countries, with overall conclusions regarding the issues raised by these cases" (TD/RBP/CONF.4/6); (iii) a feasibility study on developing a bibliography and database facility on RBPs (TD/RBP/CONF.4/7); (iv) a study on "The scope, coverage and enforcement of competition laws and policies and analysis of the provisions of the Uruguay Round Agreements relevant to competition policy, including their implications for developing and other countries" (TD/RBP/CONF.4/8), and (v) a note on "Basic objectives and provisions of competition laws" (UNCTAD/ITD/15).

13. In addition, the UNCTAD secretariat has prepared the draft outline of a study on "Empirical evidence of the benefits (including benefits for consumers) to be gained by developing and least developed countries and countries in transition from applying competition law and policy principles to economic development in order to attain greater efficiency in international trade and development", as requested by the Review Conference, this outline is being submitted to the Expert Meeting on Competition Law and Policy. As decided in paragraph 11 of the resolution adopted by the Conference, future analytical work may, upon request by member States, cover a large range of issues. Further analytical work will be pursued in the context of informal multilateral consultations among experts participating in the Expert Meeting on Competition Law and Policy.

14. In the area of technical cooperation, the UNCTAD secretariat has prepared, for the Expert Meeting on Competition Law and Policy, a progress report reviewing technical cooperation activities undertaken by UNCTAD and other international organizations, as well as States bilaterally, with a view to strengthening its ability to provide technical assistance for capacity-building in the area of competition law and policy. In its report to the Commission, the Expert Meeting will indicate progress made on the analytical work underway, as well as on technical cooperation programmes, including the focus on technical cooperation activities for Africa, as requested in the Midrand Declaration.

15. Accordingly, the Commission may wish to:

- (a) Take note of the Expert Meeting's report to the Commission and endorse the work being done by UNCTAD in this area;
- (b) Decide that a further Expert Meeting on Competition Law and Policy will be held in 1997;
- (c) Request that priority be given to the analysis of certain areas (or aspects of certain areas) of competition law and policy;
- (d) Express support for the technical cooperation activities being undertaken by UNCTAD and call for further resources to be provided for such activities.



**United Nations
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Distr.
GENERAL

TD/B/COM.2/2/Add.1
26 September 1996

Original: ENGLISH

TRADE AND DEVELOPMENT BOARD

Commission on Investment, Technology
And Related Financial Issues
First session
Geneva, 18 November 1996
Item 4 of the provisional agenda

ISSUES RELATED TO COMPETITION LAW OF PARTICULAR
RELEVANCE TO DEVELOPMENT

Note by the UNCTAD secretariat

The present note is intended to provide substantive information on competition law and policy to the Commission, taking into account current developments and UNCTAD's role in this area, as a complement to the main note on these issues prepared by the UNCTAD secretariat.

1. Competition policy aims at minimizing restrictions upon free competition, both by controlling restrictive business practices (RBPs) engaged in by firms, and by promoting the reform of governmental regulations or measures where they unjustifiably distort competition or create barriers to market entry by new competitors. These two aspects of competition policy are interrelated, since not only may governmental measures restrain competition in their own right, but they may also provide incumbent firms with the opportunity to engage in RBPs.

2. RBPs are practices by enterprises which limit access to product or geographical markets, which aim at maintaining a dominant position of market power, or which otherwise unduly restrain competition. As well as RBPs, such practices may be referred to in different national laws as restrictive trade practices, restraints of competition, monopolistic practices, or unfair trade practices. There are basically four ways enterprises can commit RBPs - although these four ways may sometimes overlap. An enterprise may try and control a market unilaterally by abusing its dominant position of market power in a number of ways, such as through predatory pricing (selling below cost to eliminate competitors) or unjustified discriminatory pricing for different customers. Alternatively, some enterprises which are existing or potential competitors can collectively undertake horizontal practices with each other - this usually involves forming a cartel to fix prices, to collude bids for a tender, or to allocate markets, customers, or sales or production quotas, and enforcing its arrangements through collective boycotts or other RBPs. Thirdly, an enterprise may impose a vertical restraint such as resale price maintenance, exclusive dealing, or tying the supply of some products to other products, along the chain of production, sale and distribution; this may be either upstream (e.g. where a large chain of distributors imposes restrictions upon a supplier) or downstream (where a manufacturer inserts a restriction in the contract it makes with its distributor, or the distributor does this with an individual consumer). Competition authorities usually prohibit most such vertical restrictions only if the enterprise applying the restriction is in a dominant position of market power or is abusing it, or if the adverse effects upon competition are not outweighed by the advantages for distribution or service. Finally, enterprises may try to concentrate their market power by undertaking horizontal, vertical or conglomerate mergers or joint ventures - again competition authorities will look at such arrangements on a case-by-case basis to see if they are likely to restrain competition and if there are any offsetting efficiency benefits.

3. As indicated above, competition authorities in many countries also have the right to advocate liberalization of regulatory measures which may adversely affect competition, such as the grant of monopolies or exclusive rights, subsidies, the allocation of production inputs, price controls, establishment or capacity licensing requirements, statutory marketing arrangements, other industrial policy measures, or restrictive trade or foreign investment policies. The objective of such advocacy is not merely to promote deregulation for the sake of it, but also to put into place the basic preconditions for effective competition amongst firms, so that deregulation is not merely followed by a "privatization" of governmental restraints.

4. Competition policy aims at safeguarding or promoting consumer welfare and economic efficiency. This is because competition encourages firms to become more efficient and innovative and encourages market entry by new firms. This makes prices more flexible and closer to costs, promotes efficient resource allocation throughout the economy, brings about a greater variety of cheaper or better quality goods and services for consumers (this includes intermediate inputs for user industries, making them more competitive), encourages technological innovation, and pushes firms and industries to become more

efficient and more competitive in international trade. In different jurisdictions, competition policy may also aim at a variety of other objectives, such as ensuring freedom of economic action, fairness in the market, controlling concentration of economic power, the public interest, or (in the European Union) greater integration of a regional market.

5. However, the distinctions among these other criteria and consumer welfare and efficiency criteria are blurred. There has been increasing convergence in the provisions or the application of competition laws over the last two decades, although there continue to be significant differences among them. Competition policies in many countries are now placing relatively greater emphasis upon the protection of competition, as well as upon efficiency and competitiveness criteria, rather than upon other goals. It is now generally accepted that a market-oriented policy requires both a reduction in direct State intervention in economic activity and more effective State intervention in providing an enabling framework ("rules of the game") for enterprises to do business, and competition policy constitutes a key part of such a framework. At the same time, it is recognized that proper economic analysis and flexibility in applying competition policy are necessary so as not to impede efficiency or consumer welfare instead of promoting them.

6. In parallel with this evolution and convergence in the goals and application of competition policy, there has been a substantial increase in the numbers of countries which have adopted and effectively implemented competition policies. Competition laws were adopted over a century ago in Canada and the United States, and all developed countries now also have competition laws. So do most of the countries of Central and Eastern Europe. A large number of developing countries have also adopted or are adopting competition laws, or are reforming existing laws. This trend is linked to the widespread adoption of market-oriented economic reforms, including deregulation, price liberalization, privatization and liberalization of controls upon trade and direct foreign investment.

7. The acceleration of globalization and trade and foreign investment liberalization have led competition authorities, in applying competition policy, to take more into account the effects of direct foreign investment and trade upon competition in the domestic market. But most national competition policies do not apply to RBPs which solely affect foreign markets, such as export cartels. In such cases, it is often difficult or impossible for the country whose markets are affected to gather the necessary evidence or to take effective remedial action without full cooperation from the authorities of the country where the RBP originates.

8. Similar difficulties may also be faced where RBPs are practised by foreign investors. The detection of practices by foreign investors may raise special problems because of their transnational structure; once detected, much of the relevant evidence may be located overseas. Special expertise may be required to evaluate whether the sophisticated practices used by foreign investors should be proscribed or may be acceptable because of efficiency benefits they may entail (it should be noted that national treatment is generally observed by competition authorities in examining the practices of foreign investors, and parent-subsidiary relationships within a transnational corporation are usually fully taken into account in evaluating the

acceptability of a practice). Enforcement problems may also arise since it would be difficult to compel the parent firms of TNCs located in other countries to follow orders issued by a national competition authority (issues of extraterritorial jurisdiction may arise in this connection), while subsidiaries may have insufficient assets located on national territory. The application of RBP controls would usually not act as a deterrent to foreign investors, particularly if they follow universal competition principles, but problems may sometimes be experienced with threats of relocation. Such difficulties may be faced in particular by developing countries, given their limited resources, small markets, possible lacunae in their competition policy frameworks, or weaker bargaining positions vis-à-vis foreign investors. Globalization and liberalization, while generally positive for competition, may also lead foreign firms (like national firms) to increase efforts to maintain or strengthen their market positions through resort to RBPs, and may also lead to new types of RBPs across borders, whose effects may be reinforced by the continuing trend towards international mergers, joint ventures and strategic alliances. There is therefore a strong need for technical cooperation on competition policy to assist developing countries' national efforts, as well as for the reinforcement of international information exchange, consultations and cooperation in this area, involving more countries and using as a basis existing bilateral or plurilateral cooperation agreements among developed countries.

9. Long-standing attempts have been made by the international community to adopt a multilateral instrument to strengthen cooperation in this area and to deal with private barriers to trade, starting in 1948 with Chapter V of the abortive Havana Charter. An important step in this area has been taken through the conclusion of the Uruguay Round Agreements, which contain several important provisions relevant to competition policy (particularly in the Agreements dealing with safeguards and with services). It should be noted that the Agreement on the Trade Related Aspects of Investment Measures (TRIM) provides that, when the Council for Trade in Goods reviews its operation (which is not to be done before January 2000), it shall consider whether the Agreement should be complemented with provisions on investment policy and competition policy. Informal proposals by the European Union and by Japan to further strengthen the linkages between the trading system and competition policy have been made recently for consideration by the WTO Ministerial Meeting in Singapore in December 1996.

10. UNCTAD has long played an important role in this area. In 1980, in its resolution 35/63, the General Assembly unanimously adopted the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. This instrument is not legally binding, but has the authority of a General Assembly resolution. It aims at ensuring that RBPs do not impede or negate the realization of benefits that should arise from trade liberalization, particularly those affecting the trade and development of developing countries. It sets out principles and rules to be observed by enterprises and Governments in this area, and sets up machinery

for intergovernmental consultations and cooperation, both bilaterally and under the auspices of UNCTAD. UNCTAD thus provides the only universal forum where Governments can exchange views and experiences, and promote consensus and convergence, on competition issues. It also undertakes a significant technical cooperation programme in this area, which includes advisory and training activities and assisting countries in formulating competition policies and legislation, and has provided important impetus for the adoption or reform of competition laws by developing countries.
